CHONG CHOW FONG

v.

BAN TUCK (M) SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 34 OF 1981]
2 MARCH 1983

CIVIL PROCEDURE: *Summary judgment - Action for goods sold and delivered - Denial of debt - Plea of - Whether defence bad in law - Affidavit in support - Right of cross-examination.*

The appeal was against the decision of the President, Sessions Court, giving summary judgment in favour of the respondent under O. 26A r. 3(1) of the Subordinate Courts Rules, 1980 in an action for goods sold and delivered. The defence filed against the action merely denied that the sum claimed was owing to the respondent. The respondent applied for summary judgment. The affidavit in support was affirmed by the respondent's managing director exhibiting certain documents. An affidavit in opposition was affirmed by the appellant. Notice to cross-examine the respondent's Managing Director upon his affidavit was given and oral application for leave to cross-examine made at the hearing. The respondent's Managing Director did not appear at the hearing. No order for leave to cross-examine was made.

Held:

[1] The defence was bad in law. In an action for goods sold and delivered the defendant must plead facts which negative its existence or show the action to be unreasonable on other grounds, otherwise the defendant will be taken as admitting the claim and the plaintiff would be entitled to judgment without having to adduce any evidence in support of his case. [*Harris v. Gamble* [1878] VII Ch. D. p. 877].

[2] The application for leave to cross-examine was perfectly in order. In such a situation the Court must, except in special circumstances, reject or disregard the affidavit, but the President had not addressed his mind to the application. [*Choo Kim San v. Malaysia Borneo Finance Corporation (M) Bhd. & Anor.* [1976] 1 MLJ 37; *Allen v. Allen* [1894] AC 248].

[3] The President had in fact precluded the defendant from defending but there is no power to do so where there is a serious dispute as to fact. At the date of hearing it was the new rules which were in force [*Foo Chiew Fong v. Guriman* [1957] MLJ 51 distinguishable as decided under the old rules].

[4] In the circumstances of the case the President should have given leave to both parties to cross-examine the deponents on their affidavits and adjourned the case for that purpose since the respondent's Managing Director was not in Court. The President ought to have addressed his mind to the questions of adjournment and whether there were special circumstances justifying reliance upon the affidavit of the respondent's Managing Director. This he had failed to do [*Lindwall v. Lindwall* [1967] 1 WLR 143, 146E to F; *Shea v. Green* [1886] 2 TLR 533].

[Appeal allowed. A re-hearing before another President ordered. Leave to cross-examine granted.]

Cases referred to:
Harris v. Gamble [1878] VII Ch D 877
Choo Kim San v. Malaysia Borneo Finance Corporation (M) Bhd. & Anor. [1976] 1 MLJ 37
Allen v. Allen [1894] AC 248
Foo Chiew Fong v. Guriman [1957] MLJ 51
Lindwall v. Lindwall [1967] 1 WLR 143
Shea v. Green [1886] 2 TLR 533

Legislation referred to:
Subordinate Courts Rules 1980, O. 26A, rr. 3(1), 4(3)
Subordinate Courts Rules 1950, O. X r. 7

For the appellant - Andrew Lim; M/s. Lim Cheng Poh & Lim
For the respondent - Chew Biman; M/s. Chew Biman

JUDGMENT

Edgar Joseph Jr J:

At the conclusion of the arguments yesterday, I allowed this appeal and shall now state my reasons for having done so.

This was an appeal against the decision of the learned President, Sessions Court, giving summary judgment in favour of the respondent for the sum of RM12,449.25 under the provisions of O. 26A r. 3(1) of the **Subordinate Courts Rules, 1980,** in an action for goods sold and delivered.

The record provided shows that the defence filed merely denied that the sum claimed or any part thereof was owing by the appellant to the respondent who was put to strict proof. Such a defence is bad in law because in an action for goods sold and delivered the defendant must not merely plead a denial of the debt but must plead any facts which negative its existence or show that the action is unsustainable on other grounds, for example, the order or contract, the delivery of the amount claimed. Indeed, if a defendant by his Statement of Defence simply "puts the plaintiff to proof of the several allegations in their statement of claim" the defendant will be taken as admitting the claims alleged in the Statement of Claim and the plaintiff would be entitled to judgment without adducing any evidence in support of his case: [See *Harris v. Gamble* [1878] VII Ch D 877].

The record also shows that an application in due form was made by the respondent praying for an order that the appellant be precluded from defending as the Statement of Defence does not disclose any defence, is frivolous, vexatious, *mala fides* and a sham tending to prejudice and delay a fair trial of the action and asking for judgment in favour of the respondent. The affidavit in support was affirmed to by the respondent's Managing Director exhibiting a photostatic copy of the relevant invoice which bears a signature of the appellant apparently acknowledging its contents. There was also exhibited a Chinese letter dated 20 May 1980, signed by the appellant apparently promising to settle the amount claimed. It was finally affirmed that the defence was a fabrication and its purpose was to obtain delay. There was however an affidavit in opposition affirmed to by the appellant in which the appellant claimed that he was induced to sign the invoice in question upon the false representation of the respondent's Managing Director that the goods were already packed and ready to be loaded for transportation to the appellant's premises. It was further alleged that the acknowledgment of receipt of the goods, being five bales of cotton, by the carrier of the goods, was not disclosed nor the name of the transport company mentioned. It was further

alleged that the appellant's solicitors had written to the plaintiff's solicitors requesting the name of the transport company to be furnished but that this request was ignored. There was however no application for further and better particulars.

As regards the Chinese letter it was alleged that the contents related to transactions between the respondent and Beaut Line Trading Co., a company of which the appellant was Managing Director which then had a place of business at No. 41, Victoria Street, Penang, and which has since stopped trading, in other words, it was said that this letter was irrelevant to the claim.

It also appears that notice to cross-examine the respondent's Managing Director upon his affidavit, although not in the usual form, was duly given, yet at the hearing before the President he did not appear. The record suggests that Counsel for the appellant in the Court below (who incidentally was not Counsel who appeared for him on the appeal) referred to the affidavit by the respondent's Managing Director and claimed the right to cross-examine. I take it, therefore, that an oral application for leave to cross-examine was made. If so, this was perfectly in order: [*Choo Kim San v. Malaysia Borneo Finance Corporation (M) Bhd. & Anor.* [1976] 1 MLJ 37]. In such a situation the Court shall except in special circumstances reject or disregard the affidavit. As was said by Lopes LJ in *Allen v. Allen* [1894] AC 248

> It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having opportunity of testing its truthfulness by cross-examination ... no evidence given by one party affecting another party in the same litigation can be made admissible against that other party unless there is a right to cross-examination.

Be that as it may, no order for leave to cross-examine was made and indeed the learned President does not appear to have addressed his mind to the application for leave to cross-examine.

I think there is a natural reluctance on the part of Courts to decide cases summarily on affidavits where there is a serious dispute as to the facts and the tendency in such cases is to hear evidence *viva voce* on both sides. It is true that under O. 26A of the Subordinate Courts Rules, 1980, power is conferred on the Subordinate Courts to give summary judgment, *inter alia*, in claims such as this provided the defendant is shown to have no defence to the claim, but there is no power to preclude a defendant from defending and this is what the learned President did. The old **Subordinate Courts Rules 1950,** did have such a provision, namely, O. X r. 7, where a defendant has failed to file his defence [see, e.g. *Foo Chiew Fong v. Guriman* [1957] MLJ 51], but at the date of the hearing it was the new Rules which were in force.

In my view, the appellant having served the notice to cross-examine the respondent's Managing Director upon his affidavit and it having been read out to the Court, reinforced by the fact that Counsel on his behalf had, at the hearing, claimed the right to cross-examine, the learned President should, in the first place, have addressed his mind to the question whether an adjournment should be granted for this purpose as an element of discretion was involved. As was said by Willmer LJ in *Lindwall v. Lindwall* [1967] 1 WLR 143:

> When a party has sworn an affidavit, as the husband is required to do under the provisions of r. 58(4) of the Matrimonial Causes Rules, 1957, I do not think that the other party can be denied the right to cross-examine upon it, at any rate in a case where, as in the present, the affidavit has been read to the Court.

In the second place, if he had decided not to grant the adjournment, he should have addressed his mind to the further question whether there were special circumstances justifying reliance upon the affidavit of the respondent's Managing Director who had failed to comply with the notice to cross-examine: [*Shea v. Green* [1886] 2 TLR 533]. In the event, he never exercised his discretion on either of these questions and simply concluded there was no merit in the appellant's assertion and the submissions made on his behalf. I hold that in the circumstances of this case, the learned President should have given leave to both parties to cross-examine the deponents on their affidavits and adjourned the case for that purpose since the respondent's Managing Director was not in Court, though the appellant was.

Consequently, in order that substantial justice may be done, I ordered a re-hearing before another President but made no order as to costs. At the re-hearing Counsel for each party will have the right to cross-examine the deponents on the affidavits aforesaid for which purpose I give leave. The learned President will then decide, needless to say without prejudging the issues to be determined at the trial, whether to give summary judgment or leave to defend, and, if so, on what terms, if any, in accordance with the provisions of O. 26A r. 3(1) or r. 4(3) of the Subordinate Courts Rules 1980, as the case may be.

Also found at [1983] 2 CLJ 25